

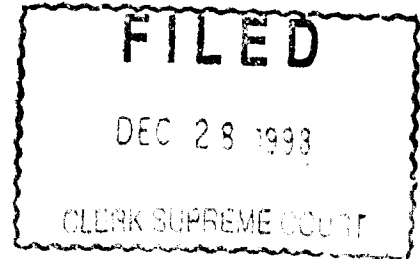
IN THE COURT OF APPEALS OF IOWA

No. 8-652 / 98-237
Filed December 28, 1998

STATE OF IOWA,
Appellee,

vs.

STEVEN RICHARD BOCKERT,
Appellant.



Appeal from the Iowa District Court for Webster County, Ronald H. Schechtman (motion to suppress), Allan L. Goode (trial), Judges.

Steven Bockert appeals his convictions and sentences for possession of methamphetamine with intent to deliver, possession of marijuana, possession of ephedrine with intent to use as a precursor, and failure to affix a drug tax stamp (methamphetamine), claiming evidence seized pursuant to the search warrant should have been suppressed. **REVERSED AND REMANDED.**

Joseph B. McCarville, Fort Dodge, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, James J. Koll, County Attorney, and Steven Lickiss, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink, Streit, Vogel and Mahan, JJ.

VOGEL, J.

Steven Bockert appeals his convictions and sentences for various drug-related charges claiming that evidence seized pursuant to the search warrant should have been suppressed. As we find the magistrate failed to make the required finding of reliability of the confidential informant, we reverse and remand.

Background facts. On October 30, 1996, the Fort Dodge police department applied for and secured a search warrant for Bockert's home. After execution of the warrant, Bockert was charged with possession of methamphetamine with intent to deliver, possession of marijuana, possession of ephedrine with intent to use as a precursor, and failure to affix a drug tax stamp to the methamphetamine and marijuana. Bockert filed two motions to suppress which were denied by the district court. A jury trial was held in December of 1997, resulting in verdicts of guilty on all counts. The trial court denied Bockert's motion for new trial, but dismissed the charge of failure to affix a drug tax stamp to the marijuana pursuant to an agreement of counsel. Bockert now appeals.

I. Search warrant. The warrant at issue relied upon information supplied by two confidential informants who indicated that Bockert was involved in drug dealing. Bockert claims that the statutory requirements of Iowa Code section 808.3 were not satisfied as to one of the informants and that the other informant's information was

stale at the time of the application. Bockert concludes that the application did not supply probable cause for issuance of the search warrant.

Our review of the district court's determination concerning the statutory sufficiency of the search warrant is for correction of errors at law. *State v. Beckett*, 532 N.W.2d 751, 753 (Iowa 1995). We review de novo the district court's ruling regarding probable cause for issuance of the search warrant. *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993). Under that standard, we must independently evaluate the totality of the circumstances as shown by the entire record. *Id.*

In Iowa, when a search warrant is based upon information provided by a confidential informant, the magistrate must make a finding that the confidential informant is credible based on one of the following grounds: (1) the informant has provided reliable information on previous *occasions*; or (2) the informant or information appears credible for reasons specified by the magistrate. *See State v. Myers*, 570 N.W.2d 70, 73 (Iowa 1997) (emphasis added); Iowa Code § 808.3 (1997). In this case, the magistrate indicated that he found the testimony from the two confidential informants credible because they had given reliable information on prior occasions. However, it is undisputed that the individual identified in the parties' briefs as confidential informant #2 had provided reliable information on only *one* prior occasion. Our supreme court has held that this does not satisfy section 808.3.¹

¹ We note that the legislature has recently decided to amend the language in Iowa Code section 808.3 and eliminate the "prior occasions" requirement. The new section simply

See Myers, 570 N.W.2d at 74. The court has stated that one prior reliable report might satisfy the second ground for reliability if the magistrate also provides sufficient reasons for finding the informant or information credible. *See Id.* However, that ground was not selected by the magistrate in this case, nor were additional findings of credibility made. We conclude that the endorsement fails to satisfy the requirements of section 808.3 with regard to confidential informant #2. Therefore, the probable cause determination must be evaluated solely on the basis of information obtained from confidential informant #1. *See Beckett*, 532 N.W.2d at 754.

Probable cause to issue a search warrant exists when the facts presented to the magistrate show that a reasonably prudent person would believe a crime was committed at the place to be searched or that evidence of a crime could be located there. *State v. Padavich*, 536 N.W.2d 743, 747 (Iowa 1995). The facts presented to the magistrate in the affidavit in support of the warrant application must exist at the time the warrant is applied for. *State v. Gillespie*, 530 N.W.2d 446, 448 (Iowa 1995) (interpreting Iowa Code §§ 808.3, 808.4 (1997)).

Bockert asserts that the information given by confidential informant #1 in May or June of 1996 was stale by the time application for the warrant was made on

provides that when the grounds for issuance of the warrant are supplied by an informant, "[t]he application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant." 1998 Iowa Acts ch. 1117, § 1.

October 30, 1996. The State asserts that the information was not stale because Bockert had been under investigation for some time. We recognize that under certain situations, evidence of ongoing, related criminal activity may save a warrant from a challenge of staleness. *See State v. Woodcock*, 407 N.W.2d 603, 605 (Iowa 1987) (noting that the passage of time is less significant where information indicates activity of a protracted and continuous nature) (citing *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972)). However, the previous investigation and surveillance of Bockert's house produced no additional evidence to support the issuance of a search warrant. Without deciding whether or not the information supplied by confidential informant #1 was sufficient to support probable cause for issuance of a search warrant in May or June of 1996, we determine that the information was stale when application was finally made on October 30, 1996. Therefore Bockert's motion to suppress should have been granted. We accordingly reverse and remand for proceedings not inconsistent with this opinion.

As we are reversing these grounds, we need not address Bockert's ineffective assistance of counsel claim.

REVERSED AND REMANDED.